Supreme Court, U.S.
FILED
MAY 28 1996
OFFICE OF THE CLERK

No. 96 37

In The

Supreme Court of the United States

October Term, 1995

GARETH REES AND TERREL JOHNSON,
Petitioners,

vs.

STATE OF TEXAS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE THIRD JUDICIAL DISTRICT

R. James George, Jr.*
Renea Hicks
Peter D. Kennedy
GEORGE, DONALDSON & FORD, LLP
114 West 7th Street, Suite 1000
Austin, Texas 78701
(512) 495-1400
(512) 499-0094 Fax
ATTORNEYS FOR PETITIONERS

Thomas L. Kolker
GREENSTEIN & KOLKER
1006 East 1st Street
Austin, Texas 78701
(512) 472-6270
(512) 472-8263 Fax
ATTORNEY FOR PETITIONER TERREL JOHNSON

Cynthia L. Biggers
BIGGERS & SCHMELER, PC
200 East 6th Street, Suite 206
Austin, Texas 78701
(512) 472-1736
(512) 472-0530 Fax
ATTORNEY FOR PETITIONER GARETH REES

Larry Sauer
LAW OFFICE OF LARRY SAUER
1004 West Avenue
Austin, Texas 78701
(512) 479-5017
(512) 479-0409 Fax
ATTORNEY FOR PETITIONER TERREL JOHNSON

May 28, 1996

**Counsel of Record for Petitioners*

QUESTIONS PRESENTED

1. Does the First Amendment permit an obscenity prosecution to be based solely on a brief excerpt from a two hour educational cable television program -- unlike obscenity prosecutions of printed publications, in which all rationally related material must be considered as a whole under the Court's unanimous decision of *Kois v. Wisconsin*, 408 U.S. 229 (1972)?

2. Is sexually explicit material that has serious *educational* value, such as a brief depiction of safer sex practices contained within a two-hour cable television program about AIDS, protected by the First Amendment and this Court's rulings in *Miller v. California* and *Roth v. United States*?

PARTIES

The parties in the proceedings before the Texas Court of Appeals for the Third Judicial District were:

State of Texas, *Appellee*.

Gareth Rees, *Appellant* (No. 03-94-00290-CR).

Terrel Johnson, *Appellant* (No. 03-94-00291-CR).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINION OF THE COURT OF APPEALS AND RULINGS OF THE TRIAL COURT . . 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS BASED SOLELY ON A SHORT SNIPPET EXTRACTED FROM A LARGER WHOLE, EVEN WHEN THE MEDIUM IS FILM, RATHER THAN PRINT 8

II. THIS COURT SHOULD ADDRESS THE IMPORTANT, BUT UNSETTLED, QUESTION OF WHETHER DIFFERENT MEDIA ARE SUBJECT TO DIFFERENT APPLICATIONS OF THE "VIEWED AS A WHOLE" STANDARD 10

III. THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS OF

INTENTIONALLY EROTICIZED SAFER SEX EDUCATIONAL MATERIALS 13

IV. THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS BASED ON MATERIAL THAT HAS SERIOUS EDUCATIONAL VALUE 15

CONCLUSION 17

APPENDIX

Opinion of the Texas Court of Appeals for the Third Judicial District, *Rees v. State*, No. 03-94-00290-CR, and *Johnson v. State*, No. 03-94-00291-CR A-1

Notice from Texas Court of Appeals for the Third Judicial District overruling Consolidated Motion for Rehearing and Suggestion for Reconsideration En Banc, *Rees v. State*, No. 03-94-00290-CR, and *Johnson v. State*, No. 03-94-00291-CR A-17

Notice from Texas Court of Appeals for the Third Judicial District denying Petition for Discretionary Review, *Rees v. State*, No. 03-94-00290-CR, and *Johnson v. State*, No. 03-94-00291-CR A-18

Charge of the Court, *State v. Rees* A-19

Charge of the Court, *State v. Johnson* A-27

Defendants' Proposed Jury Instruction No. 3 . . . . . A-35

Jury Note A-36

TABLE OF AUTHORITIES

CASES

American Civil Liberties Union v. Reno,
No. C.A. 96-963 (E.D. Pa. filed Feb. 8, 1996) 12

Bowers v. Hardwick,
478 U.S. 1039 (1986) 10

Jacobelis v. Ohio,
378 U.S. 184 (1964) 7

Kois v. Wisconsin,
408 U.S. 229 (1972) 3, 9, 12

Luke Records, Inc. v. Navarro,
960 F.2d 134 (11th Cir. 1992) 14

Memoirs v. Massachusetts,
383 U.S. 413, 419 (1966) 16

Miller v. California,
413 U.S. 15, 93 S. Ct. 2607,
37 L. Ed.2d 419 (1973) 8, 13, 15, 16

Penthouse v. McAuliffe,
610 F.2d 1353 (5th Cir.),
cert. dism'd, 447 U.S. 931 (1980) 10-12

Pope v. Illinois,
481 U.S. 497, 500-01 (1987) 13

Rees v. Texas,
909 S.W.2d 264 (Tex. App.-- Austin 1995,
pet. ref'd) 4

Regina v. Hicklin,
L.R. 3 Q.B. 360 (1868) 8

Roth v. United States,
354 U.S. 476, 77 S. Ct. 1304,
1 L. Ed.2d 1498 (1957) 8

Texas v. Morales,
826 S.W.2d 201 (Tex. App.-- Austin 1992),
rev'd, 869 S.W.2d 941 (Tex. 1994) 10

United States v. One Book Called "Ulysses,"
5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*,
72 F.2d 705 (2d Cir. 1934) 8

CONSTITUTIONS AND STATUTES:

U.S. Const. amend. I 2

U.S. Const. amend. XIV, § 2 2

28 U.S.C. § 1257(a) 2

Telecommunications Act of 1996,
Pub. L. No. 104-104 § 561(b),
110 Stat. 56, 142 (1996) 12

Texas Penal Code § 43.24 3

Texas Penal Code § 43.23(c) 3

Wisc. Stat. § 944.21(2)(c)(3) 16

No. _____

In The

Supreme Court of the United States

October Term, 1995

GARETH REES AND TERREL JOHNSON,
Petitioners,

vs.

STATE OF TEXAS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE THIRD JUDICIAL DISTRICT

Petitioners, Gareth Rees and Terrel Johnson respectfully pray that a writ of certiorari issue to review the judgments and opinion of the Texas Court of Appeals for the Third Judicial District entered in this proceeding on October 18, 1995, and rendered final by the Texas Court of Criminal Appeals on February 28, 1996.

OPINION OF THE COURT OF APPEALS AND RULINGS OF THE TRIAL COURT

The opinion of the Texas Court of Appeals for the Third Judicial District is reported at 990 S.W.2d 264, and is set out at pages A-1 through A-16 of the Appendix ("App.").

JURISDICTION

The decision of the Texas Court of Appeals was entered October 18, 1995. Petitioners' Motion for Rehearing and Suggestion for Reconsideration En Banc was overruled November 15, 1995. Petitioners' Joint Petition for Discretionary Review was denied, one justice dissenting, on February 28, 1996. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, which read in relevant part:

> Congress shall make no law ... abridging the freedom of speech, or of the press ... .

U.S. Const. amend. I.

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ... .

U.S. Const. amend. XIV, § 2.

STATEMENT OF THE CASE

Introduction

Petitioners Gareth Rees and Terrel Johnson have been branded as pornographers for their attempt to teach and encourage people to practice safer sex. Their convictions were obtained and affirmed under a long-discredited theory that obscenity prosecutions may be based *solely* on a small snippet from a larger, related whole. The prosecutor for the State of Texas candidly admitted this during closing argument when he said "The [two-hour] show itself is not on trial. *The three-minute clip is on trial.*"

This Court should grant certiorari not simply to reverse the Court of Appeals' failure to follow this Court's unanimous ruling in *Kois v. Wisconsin*, 408 U.S. 229 (1972), that rationally related material must be considered as a whole. Certiorari should be granted to allow this Court to address the uncertain legal landscape that led to Petitioners' convictions -- and to answer the important questions of when, if ever, the *medium* of expression permits ignoring or modifying the "viewed as a whole" requirement, and whether the First Amendment protects valuable, but purposefully erotic, safe-sex education.

Proceedings in the Texas Courts

Mr. Rees and Ms. Johnson were indicted on single counts of promoting obscenity and displaying harmful material to a minor. See Texas Penal Code §§ 43.23(c), 43.24. The jury, after a five-day trial, acquitted Petitioners of "harmful display," but convicted them of "promoting obscenity." Petitioners were sentenced to 180 days in jail, suspended in lieu of one year's probation.

On appeal, the Texas Court of Appeals affirmed the obscenity convictions in a published opinion issued October

18, 1995. *See Rees v. Texas*, 909 S.W.2d 264 (Tex. App.--Austin 1995, pet. ref'd). The Court of Appeals overruled Petitioners' Motion for Rehearing and Suggestion for Reconsideration En Banc and on February 28, 1996, the Texas Court of Criminal Appeals, Judge Clinton dissenting, denied Petitioners' Joint Petition for Discretionary Review. App. A-17, A-18.[1]

Statement of Facts

The "Infosex" series. From October 1992 through August 1993, Gareth Rees hosted a cable-access call-in program called *Infosex*. The format was simple: Mr. Rees in front of the camera answering viewers' telephone calls. Mr. Rees hosted the program about every four weeks. Each *Infosex* program had a different topic related to human sexuality, with an emphasis on responsible behavior and the dangers of sexually-transmitted diseases, particularly HIV.[2]

Mr. Rees' first *Infosex* program concerned sexual orientation and respect. His second show discussed HIV and how at-risk people sometimes resist being tested. The third program concerned people in HIV denial -- those who refuse to accept their HIV status and keep having unprotected sex. The fourth *Infosex* program provided information about Austin-area public assistance and HIV testing. The fifth program discussed couples and sexual identity, and the sixth concerned relationships between HIV positive and HIV negative persons. The seventh in the series stressed the

---

[1]Upon Petitioners' motion, the Court of Appeals stayed issuance of its mandate until June 7, 1996.

[2]Mr. Rees is an HIV positive young gay man who lost his first lover to AIDS. Petitioner Terrel Johnson, who produced the *Infosex* program at issue, also suffers from a debilitating diseases, diabetes.

importance of communication about HIV, AIDS and other sexually transmitted diseases.

The eighth *Infosex* program, the one at issue here, had an announced theme of sexual fantasies and role-playing as a way to enhance a person's sex life in a safe way. The program aired from 12:00 a.m. to 2:00 a.m. on August 23, 1993, and was preceded by a notice advising that the program was for mature audiences only, that parental discretion was advised, and that the program would include sexual discussion, profanity and male nudity.

During the two-hour program, Mr. Rees fielded calls from a number of listeners. Most of the callers sought information about safe sex and HIV; the "fantasy" theme was not the dominant topic. While some callers were abusive, most had honest questions or comments about the dangers of sexually transmitted diseases and ways to reduce the risk of contracting AIDS. For example, Mr. Rees discussed the spread of AIDS with a caller who disapproved of a homosexual lifestyle, but who was still worried about the disease. He talked with a man whose friend feared AIDS so much he committed suicide.

Mr. Rees fielded a long call from a man who claimed to be HIV positive and who asked about the transmission of the virus and safe-sex techniques. Mr. Rees said that HIV can be transmitted through oral sex, and that "You need to make sure you wear a condom." He verbally described a "dental dam," how to make one from a condom, and that it should be used when performing oral sex on a woman, or "rimming" a man (anilingus). Responding to the caller's claim that he remained interested in sex despite being HIV positive, Mr. Rees said "I don't want you to feel you have to give up your sex life just because you're HIV positive. You'll just have to look at sex in a different way."

Mr. Rees explained the purpose of a condom's reservoir tip, and he discussed other sexually transmitted diseases and transmission rates among different population groups. He condemned the dangerous "tea room" practice of some gay men. When a caller raised the "fantasy" theme and body piercing, Mr. Rees used it as an opening to discuss the danger of infection.

Near the end of the program, Mr. Rees stated that he was going to play a videotape clip produced by the Gay Men's Health Crisis, a large New York AIDS education foundation. The video, called "Midnight Snack," briefly showed two men engaging in non-penetrative acts of safer sex that had been discussed during the program. It showed the use of the protective barriers (condoms and dental dams) that had also been discussed earlier. Importantly, it showed these practices in a way that was meant to make them attractive and stimulating to gay men, in contrast to the largely fruitless scare tactics used in old Army VD films. The short video ended with the printed words "SAFER SEX."

After the video, Mr. Rees pointed out the video's safer-sex lessons, fielded a few more related calls, and ended the show.

The Trial. True to its erroneous legal theory, the government put three minutes of the two-hour program "on trial." No government witness had even *seen* the whole *Infosex* program -- each had viewed only the short Gay Men's Health Crisis video clip. None could put the video in context with the rest of Mr. Rees' program.

Petitioners called four experts, all of whom had viewed the entire program. Each testified that the program and the short video clip had serious value in the fight against transmission of HIV and AIDS.

Over Petitioners' objections, the jury was instructed to consider *only* certain erotic acts depicted in the three-minute videotape -- *not* the two-hour *Infosex* program -- and under that instruction, Petitioners were convicted. App. A-23, A-31. Petitioners sought an instruction that would preclude conviction if the jury found serious *educational* value in the material, but that request was also refused. App. A-35.

The Court of Appeals' Decision. Both the State and the Court of Appeals acknowledged that Petitioners' convictions stood or fell on whether the three-minute video clip could be considered apart from the two-hour program. The jury instructions, the evidence, and the court's constitutional duty of independent review under *Jacobelis v. Ohio*, 378 U.S. 184, 190, (1964), all turned on this issue.

The facts, even as stated by the court (with significant omissions), amply showed a strong relationship between the two-hour program and the short video clip. App. A-4-5. However, the Court concluded that because the *Infosex* program was "a live, unrehearsed, loosely structured call-in program" and the video was "produced by parties other than appellants long before the program *Infosex* was produced," the short video was a "separate unit of perception" that could be charged separately. App. A-6-9.[3] Armed with that conclusion, the court then rejected each trial error that turned on that question, and made an independent

---

[3]The opinion also discusses another short video clip, this one of Mr. Rees, shown at the beginning of the program. Although that video was not the subject of the indictment, the Court ruled that this clip, too, could have been charged as a separate "unit of perception." App. A-9. (The court's opinion also omits the significant fact that the video only shows Mr. Rees in silhouette behind frosted glass.)

determination that the three-minute video was obscene, without referring to the rest of the program. App. A-12.

The court also affirmed the refusal to instruct the jury that serious *educational* value would preclude conviction. Perhaps feeling free to do so by its "unit of perception" test, the court ignored the issues of AIDS and safer sex permeating the case, and simply stated that "[t]he overall educational value, if any, of exposure to pornography does not create scientific value." App. A-12.

REASONS FOR GRANTING THE WRIT

I.

THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS BASED SOLELY ON A SHORT SNIPPET EXTRACTED FROM A LARGER WHOLE, EVEN WHEN THE MEDIUM IS FILM, RATHER THAN PRINT

This Court has long abandoned as contrary to the First Amendment the idea that speech can be declared "obscene" and punished based on isolated passages or excerpts. *Roth v. United States*, 354 U.S. 476, 489 (1957). That moribund principle -- credited to the British ruling of *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868) -- was used in attempts to suppress such works as James Joyce's *Ulysses*. *See United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

Before judging speech to be obscene, this Court requires it to be "taken as a whole" -- both as to its alleged "appeal to the prurient interest," and its alleged lack of "serious literary, artistic, political or scientific value." *Miller*, 413 U.S. at 24. While repeatedly reaffirming this

principle's central place in the constitutional limitations on obscenity prosecutions, Petitioners find only one case where this Court specifically considered the "taken as a whole" requirement, the unanimous decision of *Kois v. Wisconsin*, 408 U.S. 229 (1972)(per curiam).

In *Kois*, this Court reviewed an obscenity conviction gained against the publisher of an alternative newspaper. The newspaper had published two erotic photographs as illustrations to an article describing the seizure of other, allegedly obscene photographs. *Id.* at 229-30. The conviction had been obtained based on the photographs alone. This Court reversed, holding that whether or not "the State could constitutionally prohibit the dissemination of the pictures by themselves," they could not convict when the pictures were published in a newspaper and "were rationally related to an article that itself was clearly entitled to the protection of the Fourteenth Amendment." *Id.*

It seems indisputable that the short video in this case was "rationally related" to the two-hour program, and if *Kois* remains the law, Petitioners' convictions should be reversed. While the entire *Infosex* program was admitted into evidence, the jury was specifically instructed to consider only the depiction of certain erotic acts in the three-minute video shown near the end of the program. App. A-23, A-31.

The medium should not matter. *Kois* involved photographs and a newspaper article, while this case involves a video clip shown during an access-cable program. This distinction does not merit a different result. The photographs in *Kois* were surely taken at a different time and place than the articles they illustrated, and thus were distinct "units of perception" under the Texas court's reasoning. Like Mr. Rees' program, however, the article and photos were published together and were related, and thus "taken as a whole."

This Court should reject the "unit of perception" theory, and reaffirm the principle that -- whatever the medium -- prosecutors cannot censor and edit portions of citizens' expression they find objectionable without addressing the context. Isolating the short video allowed the State of Texas to successfully pretend that it was just prosecuting "a porno film," as the prosecutor told the jury -- not a serious, albeit controversial, method of AIDS education.

II.

THIS COURT SHOULD ADDRESS THE IMPORTANT, BUT UNSETTLED, QUESTION OF WHETHER DIFFERENT MEDIA ARE SUBJECT TO DIFFERENT APPLICATIONS OF THE "VIEWED AS A WHOLE" STANDARD

Petitioners' convictions may not have resulted from an isolated error. The Austin Court of Appeals is highly respected, and has not dodged controversial questions. This same court invalidated the Texas sodomy statute under the state constitution, when it could have easily followed this Court's decision in *Bowers v. Hardwick*, 478 U.S. 1039 (1986). *See Texas v. Morales*, 826 S.W.2d 201 (Tex. App.-- Austin 1992), *rev'd*, 869 S.W.2d 941 (Tex. 1994).

Rather, the result may be attributable to uncertainty and lack of definition in a critical part of the constitutional obscenity definition -- what exactly *is* the "material" that should be "taken as a whole?" The Texas Court found this to be an "uncertain and difficult" question. App. A-6.

The Court of Appeals for the Fifth Circuit also stumbled through this issue in *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dism'd*, 447 U.S. 931 (1980). The prosecutor in *Penthouse* argued that the erotic content of

adult magazines should be separately viewed from their editorial content. The Fifth Circuit, not without difficulty, concluded that this Court's precedents did not justify treating magazines differently, and that a general thematic relationship in the magazines at issue -- "entertainment for men" -- justified taking each magazines "as a whole."

Two panel members wrote separately. Judge Clark, in a theme picked up by the Texas Court of Appeals in this case, wrote "to observe that this rule of law in its present state of development creates needless uncertainty for everyone involved." *Penthouse*, 610 F.2d at 1373.

> Should it weigh the good against the bad, *i. e.*, does one brilliant article on the arts outweigh explicit pictures of a couple copulating? ... When the materials are totally independent of every other portion of the publication except through a claimed appeal to some interest of the magazine's expected audience, I submit that segment ought to be separately appraised. ... Until the court permits separate appraisal of each discrete segment of the hodge-podge, publishers, community, policeman and judge will have to continue to wonder what the drum says.

Id., 610 at 1374.[4] Petitioners of course contend that the video and two-hour program are *not* independent, but Judge Clark's concern, and the Texas Court of Appeals' ruling fifteen years later, show that more clarity is still needed.

---

[4]Judge Kravitch's separate opinion featured charts and indexes measuring, page-by-page, the amount of erotic and non-erotic content, and judging the varying value of the non-erotic content. *Id.* 610 F.2d at 1374-78 (Kravitch, J., concurring in part and dissenting in part).

The uncertainty has only been exacerbated by developing technology. *Kois* and *Penthouse* dealt with familiar print publications, yet still the Fifth Circuit struggled with the question of *collective* expression -- where is the line drawn between genuinely related and unrelated material which just happens to be bound together?

Electronic media present this issue in spades. Films, videos, broadcasts, and now computer communications in cyberspace, all contain collective assemblages of speech, variously combined and related. This Court should grant review to prevent further exploitation of the legal uncertainty with theories like the "unit of perception" concept adopted in this case.

Technological innovations will inevitably bring this Court back to the hard work of defining what speech may be regulated as "obscene" or "indecent." For example, the Communications Decency Act of 1996 is currently under judicial review, with a provision for direct appeal to this Court. *See American Civil Liberties Union v. Reno*, No. C.A. 96-963 (E.D. Pa. filed Feb. 8, 1996); Telecommunications Act of 1996, Pub. L. No. 104-104 § 561(b), 110 Stat. 56, 142 (1996). This Court will soon be facing the question of how the First Amendment's requirement that speech be "taken as a whole" relates not just to newspapers and cable-access programs, but to the multi-layered content of World Wide Web "home pages" on the Internet, which can combine diverse text, images, video and sound. This case presents an appropriate place to begin the work.

III.

THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS OF INTENTIONALLY EROTICIZED SAFER SEX EDUCATIONAL MATERIALS

The *Miller v. California* three-part test is *conjunctive*: obscene speech must contain patently offensive depictions of sexual or excretory acts, appeal to the prurient interest, *and* it must lack serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24. Because this standard is conjunctive, there is a category of speech which community standards might deem "prurient" and "offensive," *but which is constitutionally protected because it has serious value*.

Serious social value is not measured by "community standards," but rather by an objective test in light of the evidence and material taken as a whole:

> Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

Pope v. Illinois, 481 U.S. 497, 500-01 (1987).

If there is *any* material that a community might find prurient and offensive, but which has serious social value, this case concerns it. Far less noble intentions than saving lives from AIDS infection have merited careful judicial

review of unpopular speech -- and warranted reversal when the material arguably has some serious value. *See, e.g., Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (reversing obscenity conviction for lack of proof that 2 Live Crew album "As Nasty They Wanna Be" lacked serious artistic value).

The lengthy record in this case demonstrates the serious value of the *Infosex* program, including the GMHC video. Mr. Rees frankly discussed and realistically showed actual safer sex techniques, and the video showed safer sex as appealing to an audience specifically at high risk of contracting HIV.

Among the experts testifying for Petitioners was Sherry Bell, a University of Texas student health educator who explained the important, but admittedly controversial, technique of eroticizing safer sex. Because safe sex is commonly thought to be unappealing and unsatisfying, it is increasingly honored in the breach, particularly by a young generation of fatalistic gay men.

Saul Gonzalez, the founder of an AIDS outreach project which targets the Mexican-American community, explained the serious need for plain, understandable educational materials for persons of color and lower income. Many of his project's clients lack the advantages of Ms. Bell's college students, and visual material is particularly valuable to those who cannot read English, or who do not read well. He explained the importance of visual reinforcement through various media.

Tom Doyal, an Austin attorney and pioneer in the Texas battle against AIDS, explained that Mr. Rees' program reached a

> population with some teaching about how to stay alive and still conduct an erotic, intimate life. It was

> about the use of fantasy ... in lieu of going out and doing these things particularly and placing themselves at risk. It was about the use of condoms. It was about saving people's lives.

The *Infosex* program was not like the Army VD films of days past. Mr. Rees chose a different way of discussing sexuality and the dangers of sexually transmitted diseases. The choice to use the GMHC video clip on a cable-access program may have shown naivete or poor judgment -- and it may have even violated the community standards of Texas -- but because the program and video had serious value, when properly considered as a whole, it was not obscene.

IV.

THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS BASED ON MATERIAL THAT HAS SERIOUS *EDUCATIONAL* VALUE

The Texas Court of Appeals treated the four *Miller* "serious value" adjectives -- "literary, artistic, political and scientific" -- as talismanic and exclusive. It affirmed the refusal to instruct the jury that the First Amendment protects serious *educational* value, not strictly *scientific* speech.

The difference here between "education" and "science" was not theoretical: Petitioners vigorously defended the *Infosex* program as having serious educational value, including the Gay Men's Health Crisis video, while the prosecutor attacked Mr. Rees' credentials and the video because it purportedly did not teach the very safest sexual practices -- that is, it lacked scientific method. The court's resolution of this question -- "exposure to pornography does not create scientific value" -- entirely begged the question.

The *Infosex* program dealt with AIDS in a way that was accessible to an at-risk population, and the short video

presented eroticized safer sex in a manner that would make it seem enjoyable, not clinical. The *Infosex* program did not claim to be "science" -- but the evidence supported a conclusion (and a jury instruction) that it *was* a serious educational program warranting constitutional protection.

AIDS is *still* incurable; education remains the *only* way to prevent continued transmission. In this case, the jury could have agreed that the material had serious educational value, but convicted because it concluded that the value was not "scientific." This should not be the law.[5]

After this case, obscenity convictions can now be obtained in Texas based on speech that incontestably has serious *educational* value, if the jury decides that value is not quite "scientific." This Court never intended -- or else it should take this case to clarify that it did -- that the "serious literary, artistic, political and scientific" language from *Miller* was an exclusive list of the only social values that warrant First Amendment protection. While *Miller* may have heightened the standard from "utterly without redeeming social value" to "lacking serious value," it did not change the *type* of social values warranting First Amendment protection. *See Miller*, 413 U.S. at 21-24; *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966).

This Court should grant review to determine whether, when it is supported by the evidence, as here, the First

---

[5]At least one state, Wisconsin, has felt compelled to specifically add lack of "educational" value to its obscenity statute to avoid this problem. *See* Wisc. Stat. § 944.21(2)(c)(3) (material must lack "serious literary, artistic, political, educational or scientific value, if taken as a whole").

Amendment protects speech which, taken as a whole, contains serious educational value.[6]

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the Texas Court of Appeals for the Third Judicial District, and reverse the Petitioners' convictions.

Respectfully submitted,

Roger James George, Jr.*
Renea Hicks
Peter D. Kennedy
GEORGE, DONALDSON & FORD, L.L.P.
114 West Seventh Street
Austin, Texas 78701
(512) 495-1400
Fax: (512) 499-0094

ATTORNEYS FOR PETITIONERS

---

[6]The Court of Appeals ruled on the merits of this issue, thereby preserving it for review. App. A-14-15. Petitioners note, however, that the court's *dictum* regarding waiver applies only to this issue, not the question of what material is properly "taken as a whole." Further, that *dictum* is plainly erroneous, because it depends upon the court's mistaken "unit of perception" theory, and because it entirely fails to acknowledge that Petitioners preserved the error by submitting a proposed jury instruction, *see* App. A-35, which is all Texas law requires. Tex. Code Crim. Pro. art. 36.15.

Cynthia L. Biggers
State Bar No. 02308510
BIGGERS & SCHMELER, PC
200 East 6th Street, Suite 206
Austin, Texas 78701
(512) 472-1736
(512) 472-0530 Fax

ATTORNEYS FOR PETITIONER GARETH REES

Thomas L. Kolker
State Bar No. 11667300
GREENSTEIN & KOLKER
1006 East 1st Street
Austin, Texas 78701
(512) 472-6270
(512) 472-8263 Fax

Larry Sauer
State Bar No. 17674000
LAW OFFICE OF LARRY SAUER
1004 West Avenue
Austin, Texas 78701
(512) 479-5017
(512) 479-0409 Fax

ATTORNEYS FOR TERREL JOHNSON

**Counsel of Record for Petitioners*